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HOCK HUA BANK (SABAH) BERHAD

v.

YONG LIUK THIN & 7 ORS.

COURT OF APPEAL, KUALA LUMPUR

b

TUAN GOPAL SRI RAM JCA,

DATO' N.H. CHAN JCA,

DATO' SITI NORMA YAAKOB JCA

[CIVIL APPEAL NO. S-02-321 OF 1994]

6 APRIL 1995

c

PRACTICE & PROCEDURE: Judge making adverse comment on quality of evidence in interlocutory proceedings - Whether indicating bias - Whether proper - Whether Judge disqualified from hearing the main action.

PRACTICE & PROCEDURE: Trial - Disqualification of a Judge - Judge disqualified himself upon allegation of bias - Whether Judge acted on correct principles - Allegation of bias - Whether unreasonable.

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In this case the learned High Court Judge, in the course of hearing an application for extension of an injunction, made a remark on the respondents' evidence to the effect that the evidence disclosed a defence which, "*to say the least, is inherently incredible*". The respondents took the learned Judge's comment as expressing a concluded view upon their defence, and hence, applied to disqualify the Judge from hearing the trial of the action on grounds of possible bias. The learned Judge acceded to the request, but not for the reasons advanced by the respondents, which he considered groundless. According to the learned Judge, he decided upon disqualification simply because he did not wish "*to be saddled with those allegations while hearing the case at the trial*". The appellant, the plaintiff in the Court below, being dissatisfied with the decision, appealed. The primary issues that arose were:

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1. Whether it was proper of the learned Judge in the circumstances to have made the remark he did.
2. Whether in disqualifying himself upon the grounds as explained by him, the learned Judge had acted on correct principles.

Held:

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Per Gopal Sri Ram JCA (N.H.Chan, Siti Norma Yaakob JJCA concurring):

[1] The learned Judge, in passing the comment, had acted well within the province assigned to him by law. The application for his disqualification, in the circumstances, was unnecessary, wasteful and unreasonable.

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[2] It is part of a function of a Judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage. Any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage does not and cannot be said to infect his mind with bias.

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[3] A Judge, in arriving at a decision upon any matter that presents itself for scrutiny, are bound by two rules of essential justice. He must confine himself to the points raised by Counsel before him and nothing else, and secondly, he must decide the question in the light of the objective facts and in accordance with settled principles.

[4] The learned Judge had decided upon disqualification not on grounds argued before him and therefore had not acted in accordance with accepted principles. As he was sure that there was no bias on his part, and having totally rejected the respondents' allegations, he ought to have been prepared to hear the case. His fear that an allegation of bias may later be made against him is a *non-sequitur*.

Per curiam:

It is a most serious matter to allege bias against a Judge whose sole function is to decide a case according to the evidence before him. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

Per N.H. Chan JCA:

[1] Unless a Judge has a direct pecuniary or proprietary interest in the subject matter of a proceeding, the law will not assume bias on the part of the Judge. To allege bias, therefore, there must be circumstances upon which suspicion could be grounded that the Judge would appear to be biased. The proper test is whether a reasonable and fair-minded person sitting in Court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible.

[2] There was no ground here for a reasonable and fair-minded on-looker knowing all the relevant facts to suspect or to have any reasonable fear that a fair hearing would not be possible before this Judge at the trial. Just because the Judge had commented adversely on the credibility of the evidence before him in an interlocutory proceeding does not mean that he will not decide the case on the evidence adduced before him at the trial. The Judge should not have disqualified himself.

[Appeal allowed. Learned Judge directed to hear the trial of the action].

[Bahasa Malaysia Translation of Headnotes]

AMALAN & PROSIDUR: Hakim membuat komen kurang baik tentang mutu keterangan di dalam prosiding interlocutori - Samada menunjukkan berat sebelah - Samada wajar - Samada Hakim hilang kelayakan untuk mendengar kes pokok.

AMALAN & PROSIDUR: Perbicaraan - Kehilangan kelayakan seseorang Hakim - Hakim melucutkan kelayakan kerana dikata berat sebelah - Samada Hakim bertindak atas prinsip yang betul - Tuduhan berat sebelah - Samada tidak munasabah.

Dalam kes ini Yang Arif Hakim, semasa mendengar permohonan untuk menyambung satu injunksi, telah membuat komen terhadap keterangan responden yang bermaksud bahawa keterangan tersebut menyerlahkan satu pembelaan yang, "paling tidak pun tidak dapat dipercayai". Responden menganggap komen Yang Arif Hakim tersebut menegaskan satu pandangan tertutup terhadap keterangan mereka, dan dengan itu, memohon supaya Hakim menarik diri dari mendengar perbicaraan sebenar kes atas alasan wujud kemungkinan berat sebelah. Yang Arif Hakim bersetuju untuk menarik diri, tetapi bukan atas sebab-sebab yang dikemukakan oleh responden, yang dianggapnya sebagai tidak berasas. Menurut Yang Arif

- a* Hakim, beliau bertindak menarik diri kerana tidak mahu “dibebankan dengan tuduhan-tuduhan tersebut ketika mendengar kes semasa perbicaraan”. Perayu, yang tidak berpuashati dengan keputusan Hakim, merayu. Isu penting yang timbul ialah:
1. Samada wajar bagi Yang Arif Hakim, dalam halkeadaan yang wujud, membuat komen seperti yang dilakukannya.
 - b* 2. Samada Yang Arif Hakim bertindak atas prinsip yang betul apabila melucutkan kelayakan atas alasan yang dikemukakanannya.

Diputuskan:

Oleh Gopal Sri Ram HMR (N.H.Chan, Siti Norma Yaakob HHMR bersependapat):

- c* [1] Yang Arif Hakim, apabila memberikan komennya, telah bertindak di dalam kuasa yang diberikan oleh undang-undang kepadanya. Permohonan untuk melucutkan kelayakannya, dalam halkeadaan yang wujud, adalah tidak perlu, membazir and tidak munasabah.
- d* [2] Ianya adalah sebahagian daripada fungsi seseorang Hakim, yang mendengar permohonan untuk injunksi, menentukan samada wujud persoalan yang serius yang memerlukan perbicaraan. Oleh itu dalam prosiding interlokutori sedemikian beliau tidak boleh dikatakan sebagai telah melampaui fungsinya yang wajar apabila membuat komen tentang kredibiliti sesuatu keterangan atau sesuatu isu yang timbul di hadapannya pada peringkat tersebut. Segala komen yang dibuat tentang sifat atau mutu keterangan atau pliding yang dikemukakan kepadanya di peringkat itu, tidak menandakan bahwa fikiran beliau telah dijangkiti oleh berat sebelah.
- e* [3] Seseorang Hakim, apabila memutuskan sesuatu perkara yang dikemukakan kepadanya untuk penelitian, adalah terikat kepada dua kaedah keadilan asasi. Beliau mestilah menghadkan dirinya kepada persoalan yang dibangkitkan oleh Peguam di hadapannya dan tidak kepada perkara-perkara lain, dan kedua, beliau mestilah memutuskan persoalan itu dengan menimbang fakta-faktanya secara objektif dan menurut prinsip-prinsip yang sudah diterimapakai.
- f* [4] Yang Arif Hakim telah melucutkan kelayakannya bukan atas alasan-alasan yang diujahkan di hadapannya dan oleh sebab itu tidak bertindak mengikut prinsip-prinsip yang terpakai. Oleh kerana beliau pasti bahawa tidak wujud berat sebelah di pihaknya, dan setelah menolak sepenuhnya pengataan-pengataan responden, beliau sepatutnya bersedia untuk mendengar kes berkenaan. Ketakutan beliau bahawa tuduhan berat sebelah akan dilemparkan kepadanya adalah satu *non-sequitur*.

Oleh N.H.Chan HMR:

- g* [1] Melainkan jika seseorang Hakim mempunyai kepentingan kewangan atau hak dalam perkara yang berbangkit dalam prosiding, undang-undang tidak akan menganggap wujud berat sebelah di pihak Hakim. Oleh itu untuk mengatakan wujud berat sebelah, perlulah wujud satu halkeadaan tertentu, yang boleh menimbulkan syak bahawa seseorang Hakim itu mungkin akan berlaku berat sebelah. Ujian yang wajar ialah samada seorang yang munasabah dan berfikiran baik, yang duduk di dalam Mahkamah dan mengetahui kesemua fakta yang relevan,
- h* mempunyai alasan untuk mengesyakki bahawa satu perbicaraan yang adil tidak mungkin dapat dijalankan.
- i* [2] Tidak terdapat apa-apa pun alasan di sini bagi seorang pemerhati yang munasabah dan berfikiran baik, yang mengetahui semua fakta yang relevan, untuk merasa takut bahawa satu perbicaraan yang adil tidak mungkin dapat dijalankan di hadapan Hakim berkenaan. Cuma kerana Hakim tersebut membuat satu komen yang buruk terhadap kredibiliti keterangan yang wujud dalam prosiding interlokutori tidak bermakna bahawa beliau tidak akan memutuskan

kes itu berdasarkan keterangan yang akan dikemukakan kepadanya sewaktu perbicaraan kelak. Hakim berkenaan tidak harus melucutkan kelayakan dirinya. **a**

[Rayuan dibenarkan. Yang Arif Hakim diperintah mendengar perbicaraan kes].

Cases referred to:

Keet Gerald v. Mohd. Noor & Ors. [1995] 1 AMR 373 (**refd**)
Syed Ibrahim bin Syed Abdul Rahman [1984] 1 MLJ 160 (**fol**) **b**
Fary Jones Insurance Ltd. v. IFM Funding GmbH, (**fol**)
Hadmor Productions Ltd. v. Hamilton [1982] 2 WLR 322 (**refd**)
Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 QB 41 (**refd**)
Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 QB 577 (**fol**)
Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 WLR 119 (**fol**)
R v. Davies [1906] 1 KB 32 (**refd**)
R v. New Statesman, ex parte Director of Public Prosecutions [1928] 44 TLR 301 (**refd**) **c**
R v. Sharman [1930] 9 Cr App Rep 130 (**refd**)
R v. Lovegrove [1951] 1 ALL ER 804 (**refd**)
R v. East Kerrier Justices [1952] 2 QB 719 (**refd**)
The Tatiangela [1980] 2 Lloyd Rep 193 (**refd**)

Other sources referred to:

Dictionary of English Law, Jowitt's (2nd edn.) Vol. 1 **d**
Halsbury's Laws of England, 4th edn., p. 21, para. 27.
For the appellant - Roderic Fernandez; M/s. Shelly Yap Leong Tseu Chong Chia & Co.
For the respondents - Sugumar Balakrishnan; M/s. Sugumar & Co.

JUDGMENT

Gopal Sri Ram JCA: **e**

In the course of hearing an application for the extension of an injunction - I presume that it was a Mareva injunction, for there is nothing in the judgment that gives any indication as to what kind of injunction it was - Ian Chin J, made a remark about the quality of the defence delivered by the respondents (the 2nd to the 9th defendants in the Court below). I will advert to the remark in a moment. It led to the respondents making an application to disqualify the learned Judge from hearing the trial of the action. He acceded to their request; but, as will appear later, not for any of the reasons advanced by the respondents. The appellant (the plaintiff in the Court below) being dissatisfied with the decision of the learned Judge appealed to this Court. **f**

This is what the learned Judge said in relation to one of the issues raised in the respondents' defence: **g**

Mr. Sugumar Balakrishnan next argued that the plaintiff does not have a good arguable case. It will be recalled that the plaintiff's case is that through the fraud or conspiracy of the defendants or the breach of trust or fiduciary duty of the 1st defendant the defendants have profited from the RM7,681,000 which the plaintiff had released through the accounts of the 2nd to the 6th defendants. He argued that the sum of RM7,681,000 was given to the 2nd to the 6th defendants as a temporary overdraft. I had at the hearing interjected and asked Counsel what was the term of the temporary overdraft, like for how long and for what amount. He was not able to answer. What we have here is this. The plaintiff's case is that over a period of about 12 months, the 1st defendant had caused cheques to be marked and regarded cheques as good for payments when he should not with the result that the plaintiff lost RM7,681,000 and the 2nd to the 6th defendants are the direct beneficiaries of the proceeds while the 7th to 9th defendants are also beneficiaries of part of these proceeds. The 2nd to the 6th defendants **h**

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- a* case appear (sic) to be that they have an indefinite, as opposed to temporary, overdraft for an unlimited amount from the plaintiff and that the said RM7,681,000 is part of the overdraft; which defence, to say the least, is inherently incredible. Given the defence advanced and which I have just adversely commented on, I cannot see how it can be said that the plaintiff does not have an arguable case.
- b* Counsel for the respondents took the view that the learned Judge ought not to have expressed what he regarded as a concluded view upon his clients' defence. Indeed he made complaint of it before us. This Court has in *Keet Gerald v. Mohd. Noor & Ors* [1995] 1 AMR 373 set out the principles that should guide a Court when considering an application for an injunction. What was said there are, and were meant to be, guidelines: for each case must turn upon its own facts.
- c* Now, nothing that was said by this Court in *Keet Gerald (supra)* is to be taken as detracting from the right, and indeed the duty, of a Judge, in appropriate cases, to undertake a qualitative analysis of the affidavit evidence presented before him. In a case like the present I can do no better than to adopt the words of Lee Hun Hoe CJ (Borneo) in *Syed Ibrahim bin Syed Abdul Rahman* [1984] 1 MLJ 160 where he said:
- d* The onus of the caveator, prompted by the analogy with interlocutory injunction, is that before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious in other words that the evidence before the Court discloses a serious question to be tried. Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.
- e* Although the views expressed by his Lordship the Chief Justice of Borneo were in the context of an application to remove a caveat, they are, I think, of general application. Whenever a Court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken depends upon the jurisdiction the Court is exercising and,
- f* more importantly, upon the particular facts of a case.
- g* It is part of the function of a Judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him **at that stage**. And any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage does not and cannot be said to infect his mind with bias. In my judgment, it is a most serious matter to allege bias against a Judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.
- h* In my judgment, a Judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a Judge may grant an interlocutory injunction because he finds a particular line of defence
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taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our Courts as it is indeed in other jurisdictions.

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In the present case there is an added consideration. The appellants were, as I surmise, applying for a Mareva injunction. As such, the relative strength or weakness of the defence filed during the very early stages of the action is extremely relevant in assessing whether the plaintiff has an arguable case. It is a higher standard than that applicable to the usual application for an injunction. (See *The Tatiangela* [1980] 2 Lloyd's Rep. 193.) That this ought to be so is not in the least surprising: for the alleging made is that there is a risk of the defendant dissipating his assets with a view to defeating any judgment that the plaintiff may obtain against him. Since the relief is postulated upon a plaintiff's success in the main action for e.g., damages, it is only right and proper that the strength of his case be tested to ascertain how high the probabilities lie in favour of his ultimate success. The higher the degree of success, the greater is the need to protect that event by ensuring that he does not get a judgment that is as good as writ on running water. This, then is the philosophy of the Mareva jurisdiction as distilled from the authorities upon the subject.

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When a Judge comes to assess the strength of a plaintiff's case, it is a natural and essential part of that exercise to undertake an examination of the defences taken to the main action. The stronger the defence on its face, the less likely that plaintiff will succeed in his action; and less the reason to grant him interim protection. To invert the proposition, the weaker the defence on its face, the greater is the probability of the plaintiff's success in getting his judgment. That in my view is the correct approach to be adopted. The English Court of Appeal in an unreported case adopted the same approach. (See *Fary Jones Insurance Ltd. v. IFM Funding GmbH*, decided on April 10, 1979.)

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The Court, when exercising the jurisdiction that is seised of, is required to conduct a balancing exercise in order to do justice to the parties. Imposing a restraint upon a man from dealing with what is *prima facie* his property is a very serious matter indeed. It is for that reason that equity requires the parties to submit their respective cases to a critical scrutiny by the Court. In the end, it is a matter that depends upon the particular factual matrix that lies before the Judge and upon his assessment of where the justice of the case lies.

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It must also be remembered that defences are not static. Amendments may well turn what seemed a hopeless defence at the interlocutory level to a complete answer to the claim at the trial. Remarks about the quality of a defence as it stands at the interlocutory stage are tentative only. Mature and detailed argument and the quality of evidence at the trial may well lead a Judge to conclude that the preliminary view that he had formed earlier requires revision. All this part of trial work.

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I realise that I have taken some time to deal with the principles that govern the kind of application that faced the learned Judge in this case. I have done so in order to demonstrate that he acted well within the province assigned to him by law and how unnecessary, wasteful and unreasonable the application for his disqualification was in the circumstances of this case.

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In deciding to withdraw from hearing the main action, the learned Judge did not accept the reasons advanced by the respondents. He gave his own. This is what he said:

Mr. Sugumar Balakrishnan had submitted at length, some 10 pages of written submission, as to why I should disqualify myself and even though I do not find any substance in the grounds, I am bothered that in the light of the allegations I may, at the other end of the scale, be

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- a* accused that I could possibly at the trial bend over backward to give a better light to the evidence of the defendants than justified since the allegations of bias against the defendants may still weigh on me. Mr. Roderick Fernandez argued that if I should disqualify myself it may provide a precedent for a party to choose his own Judge for his case. Though that danger presents itself but what I decide in this case is of course peculiar to the facts of this case. I have decided to disqualify myself because of the allegations made in the lengthy submission of Mr. Sugumar Balakrishnan which may, for the reason I have stated, work against the
- b* plaintiff. I do not wish to be saddled with those allegations while hearing the case at the trial.

There are two matters that call for comment upon the approach taken by the learned Judge. First, in arriving at a decision upon any matter that presents itself for curial scrutiny, a Judge must confine himself to the points raised by Counsel before him. He may not decide a case upon a matter not raised by Counsel unless he has first put the point fairly to both sides.

c It is not a matter of mere technicality. It is a rule of essential justice. The principle was stated by Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1982] 2 WLR 322, at page in words that merit recollection:

- d* Under our adversary system of procedure, for a Judge to disregard the rule by which Counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge and to be given an opportunity of stating what his answer to it is. In the instant case Counsel for Hamilton and Bould complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as Counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech in the House of Lords, but he would also have wished to rely on other
- e* speeches disagreeing with Lord Wedderburn if he, as Counsel, had been entitled to refer to *Hansard*.

- f* Secondly, a judicial arbiter must decide any question presented to him for decision in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene. Criticism of a Judge is part of the territory in which he operates. So long as that criticism is made *bona fide*, based on fact and in conformity with law, none, least of all a Judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear of criticism is to abdicate duty. These are matters that form part of a well-recognised judicial philosophy and should require no reiteration.

- g* In my judgment the learned Judge failed to act in accordance with these principles. He decided upon disqualification, not on grounds argued before him. The record makes no mention of the grounds relied upon by him as ever having been put to either side. His fear that an allegation may later be made against him is a *non sequitur*. In his carefully reasoned judgment the learned Judge was at pains to point out his lack of prejudice. Yet he was not prepared to hear the case. That to my mind is wrong.

- h* Counsel for the respondent quite correctly drew our attention to the principle by which an appellate Court does not interfere with the exercise of discretion by a Judge at first instance. But it is quite plain to me that this is one of those exceptions where appellate interference is not only permissible but warranted. Despite Encik Sugumar Balakrishnan's careful argument, I am convinced that he ought not to have asked the learned Judge to withdraw from hearing the case, and that the learned Judge ought not to have obliged. Encik Sugumar ought to
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have had a little more respect for the learned Judge's ability to decide the case upon the evidence. He ought to have had as much faith in the ability of this Court to intervene where a Judge has decided a case otherwise than in according with law and the evidence.

For these reasons the appeal was allowed and the usual orders as to costs made against the respondents. We also directed that Ian Chin J shall hear the trial of the action.

N. H. Chan JCA:

I agree with my brother Sri Ram JCA that the appeal should be allowed. I only wish to add this.

Other than an interest which is pecuniary or proprietary in the subject-matter of the proceeding, the law does not assure bias so as to disqualify a Judge from acting in his judicial capacity.

Bias with regard to anyone acting in a judicial capacity means anything which tends or may be regarded as tending to cause such person to decide a case otherwise than on the evidence (*R v. East Kerrier Justices* [1952] 2 QB 719); Jowitt's *Dictionary of English Law* (2nd Edn.) Vol. 1, under "Bias" at 210.

In *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 QB 41, at 47, Slade J, giving the Judgment of the Court (Lord Goddard CJ, Cassels and Slade JJ), said this:

The question which this Court has to decide is: "What interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias?" It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice?

The Judge then went on to say this (at 47, 48):

...the authorities as a whole are almost overwhelming in support of the requirement that, to use the well-known words of Blackburn J in *Reg. v. Rand* [1866] LR 1 QB 230, 232, "a real likelihood" of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating upon them was in law incapacitated by interest from doing so.

And he concluded by saying (at 51):

In the judgment of this Court the right test is that prescribed by Blackburn J, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown:

It was held in that case, and I need to read only from the headnote (at 42; see Slade J at 51, 52):

that, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In the present case, the facts did not disclose any real likelihood of bias and the application should be dismissed.

Dictum of Blackburn J in *Reg. v. Rand* [1866] LR 1 QB 230, 232, applied.

- a* Per curiam. The frequency with which allegations of bias have come before the Courts in recent times seems to indicate that Lord Hewart CJ's reminder in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259, that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.
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In *Metropolitan Properties Co. (FGC) Ltd. v. Lannon* [1969] 1 QB 577, 599 Lord Denning M.R. said:

- c* ...in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand; see *Reg. v. Huggins* [1895] 1 QB 563; and *Rex v. Sunderland Justices* [1901] 2 KB 357, CA, per Vaughan Williams LJ (at 373). Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justices, Ex parte Bird* [1953] 1 WLR 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did.
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- e* The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "the Judge was biased."

Ackner LJ, giving the judgment of the Court (Ackner LJ and Webster J), in *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 WLR 119, 123 said:

- f* In our view, therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.
- In the past there has also been a conflict of view as to the way in which that test should be applied. Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias? ...We accept the view of Cross LJ expressed in *Hannam v. Bradford Corporation* [1970] 1 WLR 937, 949 that there is really little, if any, difference between the two tests:
- g* If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias. Of course, someone else with inside knowledge of the characters of the members in question might say: 'Although things don't look very well, in fact there is no real likelihood of bias.' That, however, would be beside the point, because
- h* the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased.

- We conclude that the test to be applied can conveniently be expressed by slightly the adapting words of Lord Widgery CJ in a test which he laid down in *Reg. v. Uxbridge Justices, Ex parte Burbridge*, apparently only reported in *The Times*, 20 June 1972, but referred to by him in *Reg. v. McLean, Ex parte Aikens* [1974] 139 JP 261, 266: Would a "reasonable and fair-minded person sitting in Court and" knowing all the relevant facts have a "reasonable suspicion that a fair trial for" the applicant "was not possible"?
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The law will not suppose a possibility of bias in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea: 3 B1. comm. 361. In consequence, the Court has regarded with particular seriousness allegations of partiality or bias on the part of a Judge or a Court as punishable contempts of Court: see 9 *Halsbury's Laws of England*, 4th edn., p. 21, para. 27. In *R v. Davies* [1906] 1 KB 32, Wills J, giving the Judgment of the Court (Lord Alverstone CJ Wills and Darling JJ), said that the punishment for attacks upon Courts is inflicted, and I quote (at 40):

not (for) the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired.

In *R v. New Statesman, ex parte Director of Public Prosecutions* [1928] 44 TLR 301, it was held that imputation of unfairness and lack of impartiality to a Judge in the discharge of his judicial duties constitutes contempt of Court. Lord Hewart CJ, giving the judgment of the Court (Lord Hewart CJ, Shearman and Branson JJ), said at 302 that:

in the opinion of the Court the meaning of the words complained of was quite free from ambiguity. They meant what they said, and said very plainly - namely, that a person who held certain views could not hope for a fair hearing in a Court presided over by the learned Judge who was named.

...The words meant that in the opinion of the writer it was impossible for a person holding certain views to get a fair hearing before that Judge.

And at 303, the Lord Chief Justice concluded thus:

...the Court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.

The instant case is not a case of a Judge who has any direct pecuniary or proprietary interest in the subject matter of a proceeding. It is, of course, plain that in such a case the law assumes bias.

In the instant case, the law will not assume bias on the part of the Judge. There must be circumstances which would lead a reasonable and fair-minded person sitting in Court to have reasonable ground to suspect that the Judge would appear to be biased. In the present case, the facts which would lead a right-minded person to think that there was a real likelihood of bias or which could have given reasonable ground for him to suspect bias on the part of the Judge had not been disclosed. There was only an imputation of bias: it is this, because the Judge had found against the respondents at the interlocutory injunction stage and had commented adversely on their evidence in the process, he should be disqualified from hearing the case at the trial. As was said by Lord Denning M.R. in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, at 599, "Surmise or conjecture is not enough." Circumstances must be shown to exist which would tend or which might be regarded as tending to cause the case not to be decided on the evidence. The proper test on the appearance of bias is whether a reasonable and fair-minded person sitting in Court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible. Applying these principles, ought the Judge to have disqualified himself from sitting? In my judgment, there was no ground for a reasonable and fair-minded on-looker knowing all the relevant facts to suspect or to have any reasonable fear that a fair hearing would not be possible before this Judge

a at the trial. The Judge should not have disqualified himself. Just because the Judge had commented adversely on the credibility of the evidence before him in an interlocutory proceeding does not mean that he will not decide the case on the evidence adduced before him at the trial. To use the words of Blackstone, the law will not suppose a possibility of bias in a Judge whose authority greatly depends upon the presumption and idea that he is already sworn to administer impartial justice.

b To use the words of Darling J in *R v. Sharman* [1930] 9 Cr App Rep 130, "if the appellants" and I may add, or parties "are to be allowed to select the Judges who shall hear their appeals," and I may also add, or cases "the business of the Court could not be carried on."

In *R v. Lovegrove* [1951] 1 ALL ER 804, Lord Goddard CJ, giving the judgment of the Court (Lord Goddard CJ, Cassels, and Lynskey JJ), said, at 804, 805 (since it is a short judgment I have reproduced it in full):

c The applicant was convicted before Lynskey J, at Bedford Assizes, and his application for leave to appeal, which has been refused by the single Judge, now comes before this Court of which Lynskey, J, is a member. It has undoubtedly been the practice recently, if the trial Judge happens to be sitting in the Court of Criminal Appeal, to adjourn the case, but the question is whether that practice need be followed in all cases in future.

d This matter was considered many years ago, and it was pointed out that in civil cases before the Supreme Court of Judicature Act, 1873, when there was no Court of Appeal and appeals were heard by Judges of the three common law Courts in banc, it was quite a common practice for the Judge before whom the trial had taken place, and whose ruling, indeed might be impugned, to sit as a member of the Court, even, in some cases, where he had sealed the bill of exceptions. This matter was considered in *R. v. Sharman (alias Sutherland)* [1913] 9 Cr. App. Rep. 130, where an application for an adjournment was made on behalf of the appellant on the ground that Ridley, J, who tried the case, was presiding in the Court of Criminal Appeal. Darling, J, giving the judgment of the Court, said (9 Cr. App. Rep. 130);

e I think this application ought not be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the Judges who shall hear their appeals, the business of the Court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen's Bench, Common Pleas and Exchequer sat in Court to hear appeals (of course, not criminal appeals), it was the usual practice for the Judge who tried the case to be present.

f The matter was considered again the same year in *R. v. Bennett, R. v. Newton* [1913] 9 Cr. App. Rep. 146. The report states that, on an application that the sentence might run from the date of conviction, Darling, J, said that (9 Cr. App. Rep. 157):

g ...the case was in the list, but defendants wished it to be postponed because the trial Judge was then a member of the Court. There was, of course, no statutory objection to the Judge sitting, and it would almost be impracticable to prohibit this unless there were more Judges in that Division. There was always an investigation by a single Judge before a case came into that Court, and there must be at least two other Judges with the trial Judge. It was a great mistake to suppose that the trial Judge would be inclined to set up his view against the opinions of his brethren or 'to fight for his own hand.' The trial Judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course.

h There are cases in which, no doubt, it would be desirable that the trial Judge should not sit, but where the ground of appeal is nothing but an argument by the appellant that the verdict was wrong there is no reason whatever why the trial Judge should not sit. In fact, it might be very useful sometimes that he should. In the present case the applicant was convicted before Lynskey, J, on two charges of receiving stolen property and was sentenced to five

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